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August 22, 2025

VIA ECF

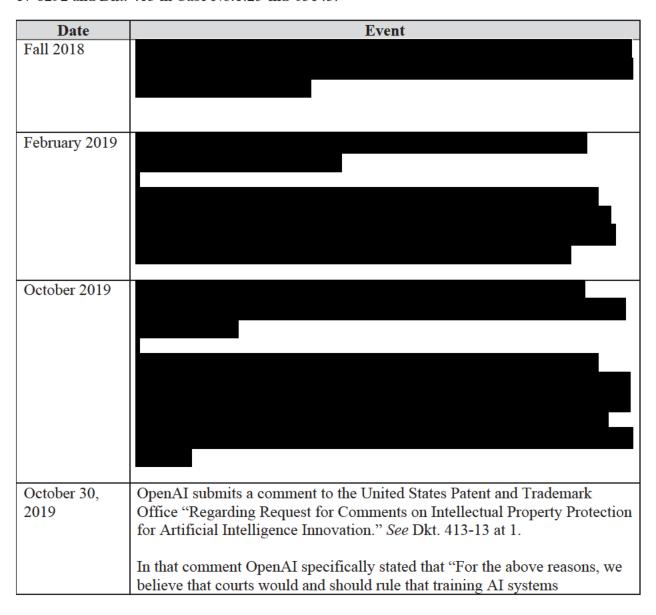
Hon. Ona T. Wang Daniel Patrick Moynihan United States Courthouse 500 Pearl St. New York, NY 10007

RE: In re OpenAI, Inc. Copyright Infringement Litigation (No. 1:25-md-03143) This document relates to the following Class Cases: Case No. 1:23-cv-08292, Case No. 1:23-cv-10211, Case No. 1:24-cv-00084, Case No. 1:25-cv-03291, Case No. 1:25-cv-03482, Case No. 1:25-cv-03483.

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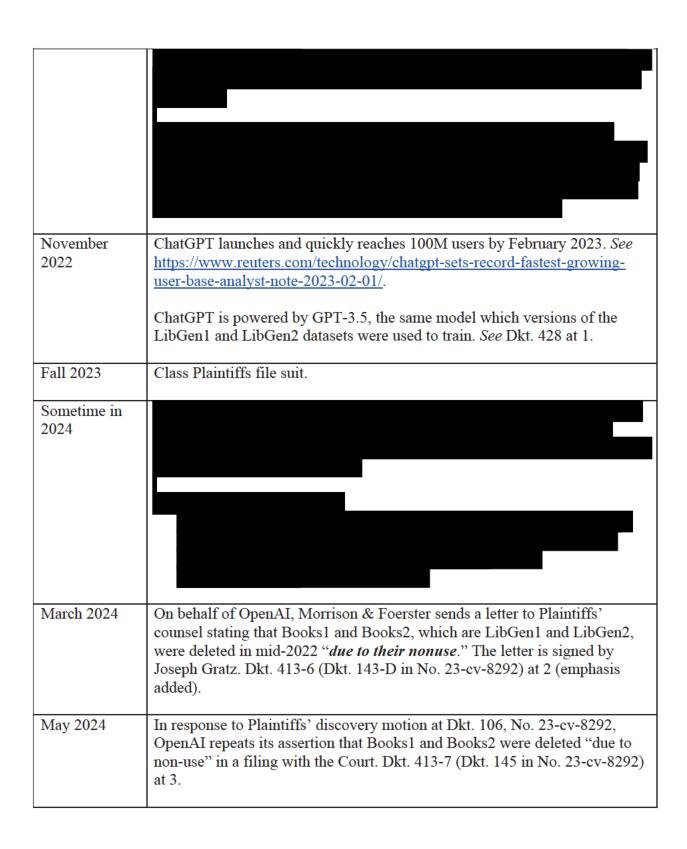
Dear Judge Wang:

Pursuant to the Court's order at Dkt. 459, Class Plaintiffs submit the following timeline documenting OpenAI's download and deletion of pirated books and inconsistent statements and positions in this litigation regarding the same. For additional information, Class Plaintiffs respectfully refer the Court to Class Plaintiffs' prior motions on this issue at Dkt. 368 in No. 23-cv-8292 and Dkt. 413 in Case No.1:25-md-03143.¹



¹ Unless otherwise noted, all docket numbers herein refer to *In re OpenAI*, *Inc. Copyright Infringement Litigation* (Case No. 1:25-md-03143).

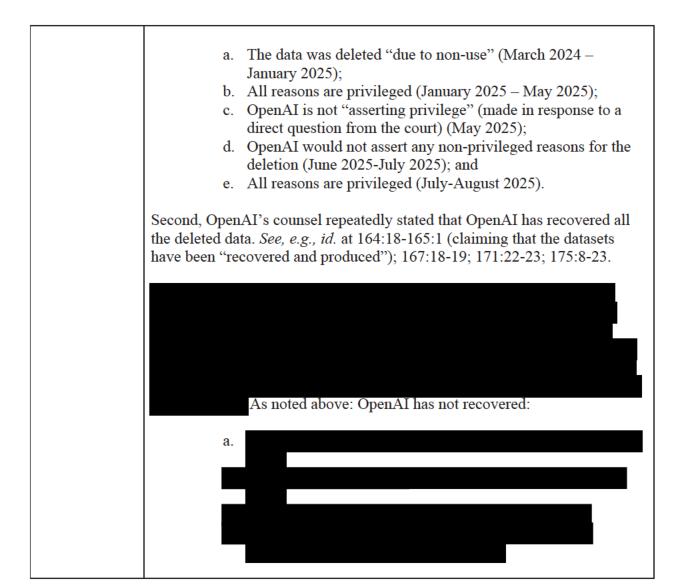
	on copyrighted works constitutes fair use. However, given the lack of case law on point, OpenAI and other AI developers like us face substantial legal uncertainty and compliance costs." <i>Id.</i> at 13. The comment is signed by, among others, David Lansky in his role as General Counsel. <i>Id.</i> ; <i>see</i> Dkt. 413-1 at 69:24-75:16.
Sometime in 2019	
Late 2019- early 2020	
May 2020	Open AI does not reference their origins in the paper except to say that they are two "internet-based books corpora." <i>See</i> "Language Models are Few Shot Learners," Brown et al. (OpenAI), p. 8, https://arxiv.org/pdf/2005.14165 .
Sometime in 2021	
Sometime in 2021	
June-July 2022	OpenAI deletes



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January 2025	The Court orders Plaintiffs be allowed to take a custodial 30(b)(6) deposition of OpenAI to assess the location and preservation of relevant stores of information. Dkt. 320, No. 23-cv-8292, at 1.
January 2025	
January-March 2025	Plaintiffs object to this invocation of privilege, the parties meet and confer, and OpenAI never withdraws its privilege claim. <i>See</i> Dkt. 368-B (email thread between counsel), No. 23-cv-8292.
	Plaintiffs file a motion at Dkt. 368, No. 23-cv-8292, seeking a court order that either (1) non-use is not privileged, (2) OpenAI has waived the privilege due to its prior representations to the Court and counsel, and (3) the crime-fraud exception to attorney-client privilege applies.
May 2025	At the hearing, the Court asked "why are you [OpenAI] asserting privilege over it, or are you not?" Dkt. 413-9 (May 27, 2025 Conf. Tr.) at 70:2-3. Counsel for OpenAI stated "[w]e are not asserting privilege and we have not blocked plaintiffs from exploring the question of nonuse of the data set to be cause of the deletions." <i>Id.</i> at 70:4-6.
	The Court orders "another 30(b)(6) deposition on this issue" so that the parties could "figure out what's privilege[d] and what's not privilege[d]." <i>Id.</i> at 71:11-14.
May-July 2025	In its objections and responses to Plaintiffs' 30(b)(6) notice, OpenAI claims that it would not "advance any non-privileged reasons for the deletion of books1 and books2 in this litigation." <i>See, e.g.,</i> Dkt. 413-10 (OpenAI Obj. and Resp.) at 7.
	Plaintiffs ask if this means "with respect to its privilege objections on these topics, OpenAI is asserting that 'all the reasons for the deletion of books1/books2 are privileged' or instead that 'regardless of whether every reason for the deletion is privileged, OpenAI will not assert any non-privileged reason for the deletion of books1/books2 in this case." Dkt. 413-11 at 17.

	In response, OpenAI does not assert that all the reasons were privileged.
June 13, 2025	OpenAI's counsel files a "Notice" that retracts its earlier representation that LibGen was deleted "due to non-use." <i>See</i> Dkt. 188.
July 25, 2025	Plaintiffs depose Mr. Trinh for a second time. At that deposition three things became clear:
July 30, 2025	In a follow-up meet and confer, OpenAI's position changes again.
	OpenAI now claims there were no non-privileged reasons for the deletion of books1 and books2, contradicting the Morrison Letter and its position at the May 27 conference. Dkt. 413-11at 1.
July 31, 2025	Plaintiffs renew their motion regarding waiver and crime-fraud, <i>see</i> Dkt. 413, additionally noting that there is probable cause of spoliation given OpenAI's acknowledged legal uncertainty prior to deletion.
August 12, 2025	OpenAI's counsel asserts incorrect facts to the court:
	First, OpenAI's counsel claimed repeatedly that OpenAI has been "consistent" in claiming privilege over the reasons for the deletion. <i>See, e.g.,</i> Ex. 5 (Aug. 12, 2025 Conf. Tr.) at 164:9-10, 165:6-7, 166:15-16, 167:12-13, 170:20-21, 171:19-20; 172:1-2.
	It has not. As shown above, OpenAI's position has shifted at least five times:

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As the above timeline illustrates, OpenAI claimed "non-use," which led Plaintiffs to pursue discovery into this reason for the deletion of these pirated books for more than a year, including filing multiple motions and spending hours meeting and conferring. *See* Dkt. 413. Yet now OpenAI is using privilege to block discovery. This is a textbook sword and shield issue in which OpenAI selectively disclosed facts to create an impression in the Court and induce reliance by the Plaintiffs and yet now seeks to block disclosure of the full factual record when pressed. Waiver is more than justified on these facts. *See id*.

To be sure, Plaintiffs reserve the right to seek appropriate remedies for spoliation due to the deletions of these pirated books, as well as to seek broader waiver or preclusion due to OpenAI's inconsistent privilege invocations regarding, e.g., its state of mind. However, in each

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case and when presenting its case at summary judgment or trial, Plaintiffs should not be forced to do so on an incomplete record of facts regarding the deletion of these datasets which OpenAI has put at issue.

Finding either a waiver of privilege or that OpenAI's conduct in deleting these pirated datasets and their underlying material—the only such material apparently ever deleted by OpenAI— while possessing substantial uncertainty regarding the legality of its conduct justifies application of the litigation misconduct prong of the crime-fraud exception to attorney-client privilege. *See* Dkt. 413.

Sincerely,

/s/Justin A. Nelson

Susman Godfrey, LLP Interim Lead Class Counsel